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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ERIC ALONZO THIGPEN, Defendant and Appellant.	C065292 (Super. Ct. No. 10F01429)

A jury convicted defendant Eric Alonzo Thigpen of felony indecent exposure (Pen. Code,[1] § 314, subd. 1) and found true an allegation that he had suffered a 2005 conviction of lewd acts

[1] Further statutory references are to the Penal Code unless otherwise indicated.

with a child under age 14 (§§ 288, subd. (a), 667, subds. (b)-(i)). Defendant was sentenced to state prison for six years.[2]

On appeal, defendant contends (1) this court should review the sealed reporter's transcript of the trial court's review of the victim's personnel file; the Attorney General does not oppose this request, and (2) the trial court's instructions and orders to the deadlocked jury violated his state and federal due process rights. We shall affirm the judgment.

FACTS

Prosecution Case-in-Chief

Defendant, a California State Prison Sacramento inmate, exposed himself to C.H., the assistant food manager.

While working in the loading dock area, defendant volunteered to move a pallet of jelly. C.H., who supervised cooks, saw defendant once or twice a week and had never developed any kind of relationship with him or seen him do anything inappropriate. C.H. had worked at prisons for 19 years.

While maneuvering the pallet into a caged area, defendant struggled to control the pallet jack that was "crashing into the walls." C.H. thought it was "taking him a long time" to drop off the jelly. Defendant mentioned that it was "rough out

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[2] The relevant 2010 amendment to section 2933 does not entitle defendant to additional conduct credit because he was ordered to register as a sexual offender and has a prior conviction for a serious felony. (Former § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

there," and C.H. initially thought he was referring to maneuvering the pallet. Defendant said he meant he was being paroled soon and it was rough on the streets. C.H. told him he should go to school and take a class that he would enjoy and succeed at. Defendant then asked about rent levels; C.H. responded that she did not know about them because she owned her home and did not pay rent. They talked about "[h]is plans for the future, going to school, getting a job, maybe at [a fast food restaurant]."

The conversation continued as defendant brought the pallet jack out of the caged area. C.H. noticed that defendant's hand was moving. When she looked down, she saw that his pants were down below his genitals and he was stroking his erect penis. He was eight to 10 feet away from her. She said, "oh, shit" and went to the supervisor's office where she reported the incident to an officer.

Aaron Ware, a cook who worked for C.H., testified that he noticed it was taking a while for defendant to unload the pallet. Ware went to check on defendant and C.H. When everything appeared fine, Ware went to the office. Several minutes later, C.H. came in and said that defendant had exposed himself. C.H. appeared startled.

On cross-examination, C.H. denied that she had encouraged defendant to expose himself or that she reported him only because she believed that Ware had seen him exposing himself. She also said she did not see defendant remove or lower his pants.

C.H. explained that she did not activate her personal alarm because she "had an officer so close and it was a busy time of day . . . ." She also had not activated her alarm when an inmate exposed himself to her years earlier.

C.H. testified that she did not share details of her personal life with inmates, but sometimes she would discuss her life in general. Inmates can learn details about employees because "[a] prison is a small community."

C.H. described defendant's conduct as "shocking and annoying" by defendant's behavior. However, she did not allow herself to be offended, because that would constitute "playing" the inmate's "game."

Defense

Defendant testified that, during the six months he worked in the loading dock area, he had exposed himself to C.H. three times. Defendant went on to describe each incident in some detail. He claimed that, in the present incident, he had exposed himself to C.H. for about 12 minutes while C.H. played with her nipples.

After Ware walked in and interrupted them, C.H. was concerned that Ware may have seen something. She told defendant that it was best that they report the incident; at worst, he would be put in segregation for two days.

Defendant admitted that, on a prior occasion, he had exposed himself to a female staff member. He acknowledged that the prior act was wrong because he did not have the female's

consent. On the prior occasion, he initially had denied that he had exposed himself because he was scared.

DISCUSSION

I

Defendant contends this court should review the sealed record of his discovery motion "in order to independently ascertain whether the trial court erroneously withheld evidence which was material and favorable to the defense." The Attorney General expressly "does not oppose" defendant's request "for this Court to review the sealed reporter's transcript of the trial court's review" of C.H.'s personnel records.

Background

Prior to trial, defendant filed a discovery motion for C.H.'s personnel records. He argued that, although C.H. was a civilian employee of the California Department of Corrections and Rehabilitation (CDCR), his request for the records was "akin to any typical *Pitchess* discovery motion . . . ."[3] CDCR opposed the motion, arguing that defendant's request was "overly broad" and that he "failed to show any cause, much less good cause" for in camera review of the personnel records.

Defendant's trial counsel submitted under seal a declaration in support of the discovery motion. At an in camera hearing in the presence of defense counsel but not the Attorney General (counsel for CDCR), the trial court questioned counsel

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[3] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

about the specific personnel information he was seeking. Defense counsel indicated he was seeking information related to two issues: moral turpitude and improper or unusual fraternization with inmates. Counsel requested for tactical purposes that the latter issue not be disclosed to the Attorney General.

Next, in open court, the Attorney General opposed defendant's request. The trial court found good cause to conduct an in camera review of C.H.'s personnel records.

Then, in a further in camera session in the presence of the Attorney General and a CDCR litigation coordinator but not defense counsel, the trial court examined C.H.'s personnel file. The court noted that the file was divided into several sections including personal confidential information, employee benefits, insurance, pay history, and employee performance. The court noted that C.H. "does have a number of excellent reviews." The court discussed a section of the file, related to employee "honesty," which contained two letters of evaluation. The first evaluation indicated that C.H. had reported contact with an inmate. Specifically, she had "indicated that she had had contact with an inmate who was on a work crew." The second evaluation recounted that an ex-husband had asked C.H. to deposit money to the prison account of an inmate. C.H. "said no."

The trial court remarked that it "ha[d] not seen anything in the personnel file that even remotely touches on, um, moral turpitude." The court further remarked that it did "not find

any basis for any remote connection to" the undisclosed issue of improper or unusual fraternization with inmates.

Finally, back in open court, the trial court stated it "has reviewed the personnel records of [C.H.] in-camera. The Court would state for the record that there is nothing in the personnel records that would either remotely qualify for disclosure under any of the categories which have been identified."

Analysis

Defendant's discovery motion was authorized by sections 1326 and 1327. (See generally *People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1315-1318; *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229.) In accordance with defendant's request and the Attorney General's express non-opposition, this court has examined the entirety of the sealed materials that we have summarized above. There is nothing in the sealed materials remotely suggesting any error by the trial court. The personnel file itself is not in the appellate record and has not been examined in the course of our review. No issue as to accuracy of the trial court's reading of the personnel file is before us.

II

Defendant contends the trial court's instructions and orders to the deadlocked jury violated his state and federal due process rights to a jury trial and proof beyond a reasonable

doubt. He invites this court to revisit its *Moore*[4] decision that approved the instruction given here to the deadlocked jury. We decline the invitation.

Background

The jury began deliberating around 1:50 p.m. on June 10, 2010. The first afternoon, the jury requested the transcript of C.H.'s testimony from defendant's preliminary hearing. The trial court instructed the jury that the transcript was not in evidence and that counsel had referred to portions of the transcript for the purpose of ascertaining whether certain trial testimony was consistent or inconsistent with the transcript. The court offered to have the court reporter read back the portions of the trial that had referred to testimony at the preliminary hearing.

The next morning a juror expressed concern for her safety because defendant evidently had been making eye contact with her. That juror was replaced with an alternate. At 10:36 a.m., jurors began their deliberations anew.

At 3:00 p.m., jurors reported that they had conducted two ballots and were "at a stalemate position and [were] unsure of our next way to progress in our deliberations." The prosecutor requested a *Moore* instruction; defendant objected to "any *Moore* instruction or firecracker instruction," noting the jurors "haven't really been out that long."

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[4] *People v. Moore* (2002) 96 Cal.App.4th 1105.

The jury foreperson reported there had not been any disputes and nothing had been expressed in terms of help the jury might need. The trial court instructed the jury pursuant to *Moore*, as set forth in the margin.[5] After the instruction was

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[5] "THE COURT: All right. I am going to ask you to continue your deliberations. It's been my experience that on more than one occasion that a jury when initially reported it was unable to reach a verdict was ultimately able to arrive at a verdict. And to assist you in your further deliberations, I'm going to give you some additional instructions at this point.

"Your duty as jurors should be to reach a fair and impartial verdict if you're able to do so based solely on the evidence that was presented and without regard for the consequences of your verdict regardless of how long it takes you to do so.

"It is your duty as jurors to carefully consider, weigh, and evaluate all of the evidence presented at the trial, to discuss your views regarding the evidence, and to listen to and consider the views of your fellow jurors.

"In the course of your further deliberations, you should not hesitate to re-examine your own views or request your fellow jurors to re-examine theirs. You should not hesitate to change a view you once held if you are convinced it is wrong or to suggest other jurors change their views if you are convinced they are wrong. Fair and effective jury deliberations requires [*sic*] frank and forthright exchange of views.

"As I previously instructed you, each of you must decide the case for yourself, and you should do so only after a full and complete consideration of all of the evidence with your fellow jurors. It is your duty as jurors to deliberate with the goal of arriving at a verdict on the charge if you could do so without violence to your individual judgment. Both the People and the defendant are entitled to the individual judgment of each juror.

"As I previously instructed you, you have the absolute discretion to conduct your deliberations in any way that you deem appropriate. May I suggest that since you have not been able to reach a verdict using the methods you have chosen that you consider a change to those methods that you have been following at least temporarily and to try new methods.

"For example, you may wish to consider having different jurors lead the discussion for a period of time. Or you may

wish to experiment with reverse role playing by having those on one side of an issue present and argue the other side's position and vice versa. This might enable you to better understand the other side's positions.

"By suggesting that you consider changing your methods of deliberations, I want to stress that I am not dictating and I am not instructing you how to conduct your deliberations. I'm merely suggesting that you may find it productive to do whatever is necessary to ensure each juror has a full and fair opportunity to express his or her views and consider the views of other jurors.

"I suggest that you also reread the instructions that you were given earlier, in particular, Instruction No. 200 and Instruction No. 3550. These instructions pertain to your duties as jurors and make recommendations on how you should deliberate.

"The integrity of the trial requires that jurors at all times during your deliberations conduct themselves as required by the instructions. Instruction No. [*sic*] 200 and 3550 defines [*sic*] the duties of a juror. The decision the jury renders must be based on facts and the law. You must determine what facts have been proved from the evidence received in the trial and not from any other source. A fact is something proved by the evidence or by stipulation.

"Second, you must apply the law as I state it to you to the facts as you determine them to be, and in this way arrive at your verdict.

"You must accept and follow the law as I gave it to you regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or any other time during the trial conflict with my instructions on the law, you must follow my instructions.

"Instruction 3550 defines the jury's duty to deliberate. The decisions you make in this case must be based on the evidence received in the trial and the instructions given by the Court. These are the matters that instruction requires you to discuss for the purposes of reaching a verdict.

"Instruction 3550 also recommends how jurors should approach their task. You should keep in mind the recommendations the instruction suggests when considering the additional instructions, comments, and suggestions I have made in the instructions I'm giving you now. And I hope that my comments and suggestions may be of some assistance to you.

"So you're ordered to continue your deliberations at this time. If you have any questions, concerns, or requests, you should submit them to me as you have done previously, putting

read, the jurors were excused for the weekend and ordered to return the following Monday. On Monday, the jury resumed deliberations at 9:00 a.m. and returned to the courtroom at 10:52 a.m. to announce its verdict.

Analysis

"In *Allen v. United States* (1896) 164 U.S. 492, 501-502 [[]41 L.Ed. 528, 531], the Supreme Court approved a charge (the *Allen* charge) which encouraged the minority jurors to reexamine their views in light of the views expressed by the majority, noting that a jury should consider that the case must at some time be decided. In *People v. Gainer* (1977) 19 Cal.3d 835 [(*Gainer*)], however, our state high court disapproved of *Allen* in two respects. The *Gainer* court found 'the discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views' was improper, inasmuch as, by counseling minority jurors to consider the majority view, whatever it might be, the instruction encouraged jurors to abandon a focus on the evidence as the basis of their verdict. [Citation.] The second issue with which the *Gainer* court took issue was the direction the jury '"should consider that the case must at some time be decided,"' noting such a statement was inaccurate because of the possibility the case might not be retried. [Citation.] In other words, it is improper to instruct the jury in language that suggests that if the jury

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them in writing on a form that the bailiff has provided and have them signed and dated by your foreperson and notify the bailiff."

fails to reach a verdict the case necessarily will be retried. [Citation.]" (*Moore, supra*, 96 Cal.App.4th at pp. 1120-1121.)

In *Moore*, this court concluded that the instruction given here did not violate *Gainer*. (*Moore, supra*, 96 Cal.App.4th at pp. 1120-1121.) We found that the *Moore* instruction does not exert a coercive effect on jurors since it "instructed that the 'goal as jurors should be to reach a fair and impartial verdict *if you are able to do so* based solely on the evidence presented and without regard to the consequences of your verdict [or] regardless of how long it takes to do so.'" (*Id.* at p. 1121.) The instruction "directed the jurors to consider carefully, weigh and evaluate all of the evidence presented at trial, to discuss their views, and to consider the views of their fellow jurors," and explained "that it was their duty as jurors to deliberate with the goal of arriving at a verdict on the charge '*if you can do so without violence to your individual judgment*.'" (*Ibid.*) "[T]he jury was never directed that it was required to reach a verdict, nor were any constraints placed on any individual juror's responsibility to weigh and consider all the evidence presented at trial." (*Ibid;* see *People v. Hinton* (2004) 121 Cal.App.4th 655, 661.)

In the Sixth District case of *People v. Whaley* (2007) 152 Cal.App.4th 968 (*Whaley*), the majority approved the *Moore* instruction, including the use of reverse role playing. (*Id.* at pp. 982-983.) In a concurring opinion on which defendant here relies, Justice McAdams indicated he was "troubled by the statement to the jurors that they should consider using 'reverse

role playing' as a method of deliberation, *especially in a case such as this one where the trial court was aware at the time of the instruction that the numerical breakdown of the deadlocked jury was 11 to one*." (*Id.* at p. 985; italics added.) Justice McAdams also expressed concern about "language found in the early and later portions of the instruction that creates the impression that the court has the expectation that the jurors should come to a verdict, the statement shortly thereafter that they have a 'goal as jurors' to reach a verdict if they are able to do so 'regardless of how long it takes,' and the concluding charge that the panel is 'ordered to continue your deliberations.' These remarks are a far cry from the restrained, neutral tone of CALCRIM No. 3550. [Citation.] [¶] I disagree with the view that such statements cannot be found to be unduly coercive because they are mere 'suggestions' made by the court. These comments are more than friendly and helpful advice. The trial judge is seen by the jury as the central courtroom authority figure, the unbiased source of the law and the same person who previously instructed them in CALCRIM No. 200 that '[y]ou must follow the law as I explain it to you, even if you disagree with it.' Thus the need for utmost caution. [¶] Nevertheless, I conclude that these concerns and criticisms do not rise to a level that compels reversal under the circumstances of this case." (*Id.* at pp. 985-986.)

Contrary to defendant's argument, nothing in *Gainer* required the trial court to, in trial counsel's words, "simply tell the jury to further debate the facts, [and] examine and

apply the law they've already been instructed" on. Rather, as defendant recognizes, *Gainer* approved an American Bar Association instruction that "'[i]t is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment.'" (*Gainer, supra*, 19 Cal.3d at p. 856, fn. 21.) This is not materially different than the present instruction that "[i]t is your duty as jurors to deliberate with the goal of arriving at a verdict on the charge if you could do so without violence to your individual judgment."

Defendant echoes Justice McAdams's concern that telling the jury its "goal" is to reach a verdict "'regardless of how long it takes'" is neither restrained nor neutral. (*Whaley, supra*, 152 Cal.App.4th at p. 985.) However, the disputed language must not be viewed in isolation. In its entirety (e.g., *People v. Carrington* (2009) 47 Cal.4th 145, 192), the instruction makes plain that the jury need devote only the time necessary to "ensure each juror has a full and fair opportunity to express his or her views and consider the views of other jurors." This is nothing more than what is required of each juror in every case.

Defendant next claims the trial court "went beyond what *Moore* approved" when it stated it was "[y]our *duty*," as opposed to your "*goal*," "to reach a fair and impartial verdict if you're able to do so based solely on the evidence that was presented . . . ." (Both italics added.) Defendant claims the difference "is critical" because, unlike the word "duty," which

connotes "a legal or moral obligation," the word "goal" imports merely "a desired but not necessarily achievable endstate."

This claim, like the previous one, mistakenly views a portion of the instruction in isolation. (*People v. Carrington, supra,* 47 Cal.4th at p. 192.) The words "if you're able to do so" make plain that, like a "goal," this "duty" imports a "not necessarily achievable endstate." There was no error.

In any event, the trial court later clarified that "[i]t is your *duty* as jurors to deliberate with *the goal of arriving at a verdict* on the charge if you could do so without violence to your individual judgment." (Both italics added.) This remedied any possible prejudice arising from the earlier iteration.

Defendant claims the suggestion to use "reverse role playing" was "far from [] harmless" for the reasons stated by Justice McAdams. Whether Justice McAdams's concerns are apposite to this case is speculative because the numerical division of the jury was not known when the instruction was given. (Compare *Whaley, supra,* 152 Cal.App.4th at p. 985.) In any event, reverse role playing connotes *both* minority jurors stating the case "the majority's way" *and* majority jurors voicing the minority viewpoint. Contrary to defendant's argument, neither group is "compelled by the process to *adopt*," rather than merely to state, the other side's view. (Italics added.) Defendant's observation that "the majority always has the comfort, advantage and moral or rhetorical advantage of being the majority" applies whenever jurors are unevenly divided

and identifies no particular vice in role-playing as a deliberative technique.

Defendant claims the suggestion to engage in reverse role playing contradicted a portion of CALCRIM No. 3550. We disagree.

CALCRIM No. 3550 told the jury in relevant part: "Keep an open mind and openly exchange your thoughts and ideas about the case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, *not to act as an advocate for one side or the other*." (Italics added.)

In context, the phrase "one side or the other" refers to the parties to the case (here, the People and defendant), not to the majority and minority factions of a deadlocked jury whose respective views may, or may not, correspond to those of the parties. Reasonable jurors would understand that the instruction to *not advocate for one of the parties* has no application to the suggestion to use reverse role-playing as a deliberative technique.

Defendant lastly contends the *Moore* instruction "dilutes the prosecution's burden of proof beyond a reasonable doubt," because the very fact of jury deadlock means the prosecution has failed to persuade all 12 jurors beyond a reasonable doubt. In defendant's view, once a jury reports that it is hopelessly deadlocked, "that should be the end of it."

Contrary to defendant's argument, nothing in the *Moore* instruction invites or allows any juror to apply a standard of proof less than beyond a reasonable doubt. Ordering further deliberations as to whether the prosecution has met the requisite standard does not invite any juror to apply a lesser standard of proof.

We thus reject defendant's suggestion that ordering further deliberations somehow "assist[s] the prosecution in *making* its case." There is no reason to assume that further deliberations will strengthen, rather than weaken, the prosecution case as opposed to the defense case. There was no error.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

BUTZ, J.

MAURO, J.